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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 194.

RIVERDALE COTTON MILLS

v.

ALABAMA AND GEORGIA MANUFACTURING CO. ET AL

BRIEF FOR APPELLANT IN REPLY.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Of Counsel for Appellant.

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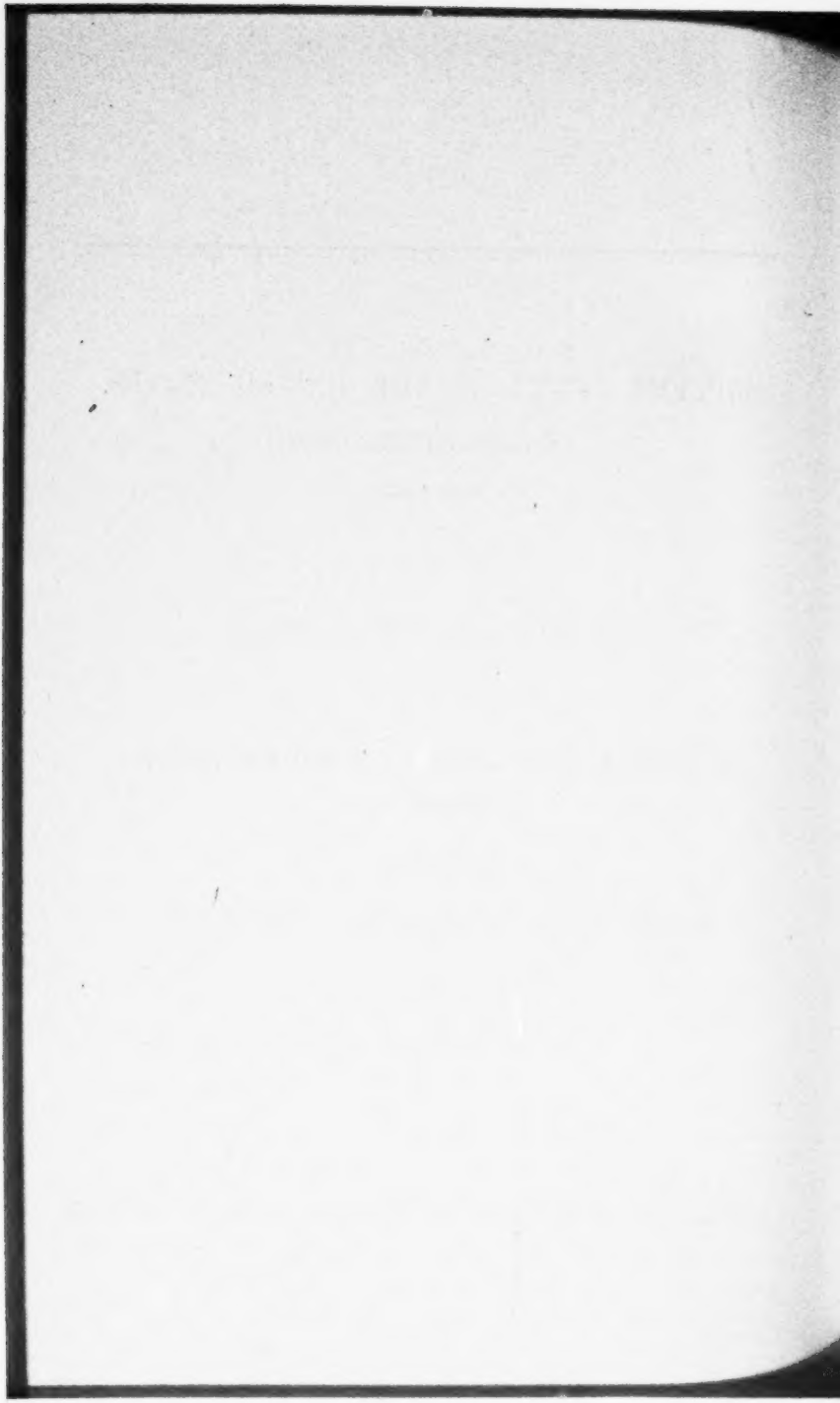

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The briefs filed in behalf of the appellees have departed so far from the case presented by the record before the court that the appellant asks leave to submit a short reply.

I.

The case must be dealt with according to the pleadings and record.

Both counsel for the appellees unite in declaring that the suit was heard in the Circuit Court upon bill and answer. Assuming that such was the case, then the court has to decide according to the allegations of the bill and answer. In doing so all allegations of fact contained in the bill not denied by the answer are to be taken as true, and all allegations of fact contained in the answer are to be taken as true. Allegations

of conclusions of law in either pleading must of course be disregarded.

The bill incorporates the record in the foreclosure suit, so that this record may be referred to as a part of the bill, and any facts so shown not denied by the answer must be taken to be true whether the proceedings in that suit constitute an adjudication or not.

What the appellees were prepared to prove if the case had gone to a hearing on the merits, and what evidence they had in support of any allegation in their answer, are, if the hearing was on bill and answer, wholly immaterial matters. Equally immaterial are any matters that amount merely to conclusions of law.

On page 8 of Mr. Erwin's brief are enumerated certain facts that "must be taken to be true." Of these the last, numbered 6, is that the decree had no effect upon the land in question: this is a conclusion of law and must be disregarded. The preceding alleged fact, numbered 5, is a fact not alleged in the answer, and, therefore, is not to be taken as true. On the succeeding pages are statements of what counsel say would have been proved at a hearing on the merits. These matters are not contained in the record and should have found no place in the brief. The learned counsel, having protested that the case was before the court on bill and answer, must have been aware that proofs and offers of proof were wholly out of place, and if the case was before the court after a hearing on the merits, proofs and offers of proof not contained in the record should obviously not be stated as part of the case for the court's consideration.

Attention is called at the outset to these departures from the record, unfortunately not the only instances of such departures, because it will appear that the appellees' case is built up largely, if not entirely, on an extrinsic fact of which the record contains neither allegation nor evidence, and because it will appear that throughout the litigation the attempts to defeat the foreclosure of the mortgage, while all made in a single interest, have assumed inconsistent positions as the exigencies of the case appeared to require.

II.

There is only a single corporation known as the Huguley Manufacturing Company concerned in the present litigation.

The original foreclosure bill named the Huguley Manufacturing Company as a defendant, describing it as a corporation organized under the laws of Georgia. (Record, p. 1.) This allegation was admitted, and the defendant corporation set up its ownership of the property. (Record, p. 22.) All the litigation proceeded on this basis through the final decree and attempts to bring the case to this court.

The suit in Alabama was filed with the Huguley Manufacturing Company as one of the plaintiffs, described as a corporation under the laws of Alabama. (Record, p. 486.) That bill alleged that the foreclosure suit was brought against "said Huguley Manufacturing Company" and others as the sole defendants. (Record, p. 488.) No Huguley Manufacturing Company except the plaintiff had up to that point been mentioned in that bill or was ever after mentioned in it. This bill also proceeded on an allegation that the Huguley Manufacturing Company owned the property.

The answer to the present bill alleged that the Huguley Manufacturing Company was organized in Alabama, and on information that it was never organized in Georgia. This allegation, though on information only, is to be taken as true.

Brinckerhoff v. *Brown*, 7 Johns, Ch. 217, 223.
Barker v. *Wyld*, 1 Vernon, 140.

The present bill alleged (par. II, Record p. 474) that it was brought against the "said" Huguley Manufacturing Company, a defendant in the foreclosure bill; and that the "said Huguley Manufacturing Company," defendant in the foreclosure suit, brought the suit in Alabama. (Par. VI, Record, p. 478.) The answer in the present suit did not seek to deny the allegations but alleged that the Huguley Manufacturing

Company was in fact organized in Alabama and not in Georgia, (Par. First, Record, p. 506); that in the foreclosure suit the court had no jurisdiction because "the complainant therein and the Huguley Manufacturing Company were citizens of the same state, to wit: the state of Alabama," (Par. Fifth, Record, p. 507); that the court in the foreclosure suit could not decree a sale because "the Huguley Manufacturing Company was a corporation under the laws of Alabama." (Par. Sixth, Record. p. 507). The allegation that "said corporations were never parties as corporations under the laws of Alabama to said foreclosure proceedings" (Answer, par. Ninth, Record, p. 508) is apparently an allegation that they were never sued by that description; on any other construction it states a conclusion of law.

Having assumed two inconsistent positions as to a matter peculiarly within its own knowledge, the Huguley Manufacturing Company by its counsel now adopts a third position. It departs from the allegations of the answer, and seeks to have the case disposed of on the basis that there are two Huguley Companies. The plain reply to this position is that no such defence is contained in the answer. The Huguley Manufacturing Company on the record has unequivocally undertaken to defend the suit on the ground that it is a single corporation organized in Alabama, and it cannot now ask the court to deal with the case on any other basis.

III.

The Huguley Manufacturing Company was at the time of the foreclosure owner of the equity of redemption.

Counsel for the appellees have sought to set up title in the Alabama and Georgia Manufacturing Company in order to show that a decree binding upon the Huguley Manufacturing Company alone was not sufficient. They have, however, apparently forgotten the allegations as to title appearing in the record.

No question is before the court as to the sufficiency of proof that the title to the equity of redemption was in the Huguley Manufacturing Company. No such issue has ever been raised. Up to the filing of the briefs in this court by counsel for the appellees it has been common ground throughout the litigation that the Huguley Manufacturing Company was the owner of the equity of redemption. In the foreclosure suit the Huguley Manufacturing Company amended its answer for the sole purpose of alleging that it was the owner of the equity of redemption. (Record, p. 22). Thereafter, the Huguley Manufacturing Company consistently carried on the litigation claiming ownership and appealed from the final decree, on the ground, among others, that as owner it was entitled to rents and profits that had been applied on the mortgage. (Rec. pp. 459, et. seq.)

In the Alabama suit in which the Huguley Manufacturing Company and its co-appellee were plaintiffs the bill alleged :

> "Orators, the Huguley Manufacturing Company, a corporation, avers that it purchased and acquired all the property hereinabove described, subject to said mortgage, and is now the owner of the same, subject to said mortgage." (Record, p. 492.)

The statement of counsel (Mr. Erwin's brief, p. 42) that the Alabama bill alleges title in the Alabama and Georgia Manufacturing Company must have been made in inadvertence.

In the present suit the bill alleges (pars. I and II, Record, pp. 473, 474) title in the Huguley Manufacturing Company, and the answer contains no denial of these allegations.

On the record it is no question of "equities." The allegations of the record are of ownership and title in the Huguley Manufacturing Company. And it is no question of evidence of title, for the allegations made by each party have been the same. The defendants cannot now by statements in the briefs filed in their behalf question facts which are alleged in the plaintiff's pleadings and not denied, or ask the court to consider evidence of such facts and according to its

sufficiency or insufficiency decide the case, when no issue has ever been raised and no attempt ever been made to prove the facts in question.

IV.

The decree in the foreclosure suit was not void.

Counsel for the appellees wholly fail to distinguish between matters which might render the decree in the foreclosure suit void and matters which might render it erroneous. The distinction is vital. However erroneous a decree may be it cannot be attacked collaterally; until reversed or set aside by proceedings brought directly for the purpose a decree remains in full force and effect even though on appeal it would be reversed.

The allegations of the foreclosure bill showed a case of which the Circuit Court had full jurisdiction, both as to subject matter and as to parties. It is not even now pretended that the court had not before it in that suit parties properly amenable to its jurisdiction or that it could not make some decree in that suit, except on the grounds:

(a) that there was not in fact the requisite diversity of citizenship; and
(b) that the land was all outside its jurisdiction and belonged to a party not before the court.

It has already been shown that the lack of diversity of citizenship is not now available to impeach the validity of the proceedings.

The location of the land and the title to it were not matters of jurisdiction. The court might make a personal decree binding upon the parties before it wherever the land was situated and whoever was its owner. The question now before the court is not whether the present appellant acquired under the decree of the Circuit Court a title good against all adverse claimants, but whether it acquired a right to protec

tion against claims by these appellees. It might be true that the Huguley Manufacturing Company had no title at the time of the foreclosure, and yet the appellant by virtue of the decree might be entitled to protection against the assertion of any claim to redeem.

The counsel for the appellees fail to distinguish between the validity of a decree as between the parties and its effect as to others. Granting that a court cannot by decree create a title to land outside its jurisdiction, it can none the less decree that a person over whom it has jurisdiction shall not assert a claim to that land.

In the present case the Huguley Manufacturing Company had in the foreclosure suit admitted and indeed asserted its ownership; the decree of the court that its equity of redemption be cut off was a personal decree; assuming that the court could not direct a sale and a deed from its officer which would pass title to all or even to any of the land, the order for such a sale may have been improvident; it may have been error for which the decree should have been reversed not to include an order on the owner of the equity of redemption to execute a confirmatory deed. These errors, if such they were, might have been corrected, but instead the decree was affirmed by the court of last resort. The existence of errors did not invalidate the decree. So much of it as the court had power to carry into execution it could execute; if the remainder was incapable of execution it resulted only in the plaintiff obtaining a less degree of relief than he was entitled to.

If, therefore, there were two Alabama and Georgia Manufacturing Company corporations, and only one was before the Circuit Court, and the title to the equity of redemption was in the other, yet as to the Huguley Manufacturing Company at least the decree cutting off the equity of redemption which it had asserted, a decree followed by full confirmation of the sale, would have been valid. In point of fact the present record shows a much stronger case, for it shows the equity of redemption actually in the Huguley Manufacturing Company.

So, too, as to the claim that the Alabama and Georgia Manufacturing Company of Alabama was a necessary party to the suit because the bill asked a personal decree against it. If such were the fact it would not invalidate the decree as against the Huguley Manufacturing Company, although the absence of a necessary party might have given a good defence if it had been set up, and although the absence of that party might prevent the plaintiff from getting relief effectual as against it.

The objection is not, however, well founded upon the facts. The foreclosure suit was brought against the owner of the equity, the Huguley Manufacturing Company. To obtain a foreclosure the court was bound to ascertain the amount due on the debt secured by the mortgage, whether the maker of the bonds was a corporation or an individual, alive or dead, a party to the suit or not a party to the suit. The court was equally bound to require payment of the debt so found by a day fixed on pain of foreclosure. In asking for such relief the plaintiff was not seeking and in granting it the court was not giving more than is necessary in every foreclosure by judicial proceedings.

If the court embodied in its decree an order for payment of the deficiency by a person not before the court, as the appellees contend, it was not in response to any prayer of the bill (See Record, p. 3), and while the order could not be enforced against such person, the error did not vitiate the rest of the decree, which the court had both the right to make and the power to execute.

V.

The proceedings in the foreclosure suit were effectual to cut off the equity of redemption of the Huguley Manufacturing Company.

The final decree in the foreclosure suit (Record, p. 356) affirmed by the Circuit Court of Appeals (Record, p. 375) provided :

"8. That the equity of redemption in and to said mortgaged premises be and the same is hereby barred and forever foreclosed, so far as the right of said defendant corporation, or any one claiming under or through it is concerned, since the date of the execution of said trust deed or mortgage, to wit, the 2d day of January, 1884." (Record, p. 360).

The Huguley Manufacturing Company, one of the present appellees, had in the suit in which that decree was entered, affirmatively asserted title to the property derived from the other defendant in that suit, and had asked to be protected in respect to any surplus arising upon a foreclosure sale. (Record, p. 22). It can hardly be seriously denied that the decree was intended to and, if effectual, did cut off the equity of redemption so asserted. The title which the Huguley Manufacturing Company claimed to have may have been good or bad; the only point now material is that the court undertook to foreclose it and that the present bill is to prevent an assertion of title contrary to that decree.

To the full benefit of that decree the appellant shows itself entitled. The bill alleges that the sale was confirmed and reconfirmed and a deed executed pursuant to the decree to the appellant, and that it paid the full purchase money into court as required. (Par. IV, Rec. p. 477.) This allegation is not denied in the answer. It is the final action of the court upon the sale under its decree that forecloses a mortgage and not the question of whether the deed conveys a good title or not. When the sale had finally been confirmed the matter became adjudicated and the decree cutting off the equity of redemption took full effect. This is the effect of *Chicago & V. R. R. Co.* v. *Fosdick*, 106 U. S. 47, cited for the appellees. This court there said:

"But as in cases of strict foreclosure, so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem." p. 71.

The sentence following quoted by the appellees' counsel does not put the giving of the deed as a matter distinct from confirmation, but refers to an earlier case containing the phrase relied on by the appellees, in support of the statement quoted above.

In determining the effect of the decree it is to be borne in mind that the present proceeding does not depend on the validity of the decree or the sale under it as a link in the chain of title. The present plaintiff is not bound to establish that it has a title good against all the world. It is sufficient to maintain the present suit that the plaintiff shows itself entitled to the benefit of a decree by which the present defendants are cut off, or at the lowest one of them is cut off, from asserting the claim which they seek to assert in the Alabama suit.

VI.

The decree in the foreclosure suit was in fact effective against the Alabama and Georgia Manufacturing Company now before the court even if there were two corporations.

Counsel for the appellees have argued at some length that there was not and could not be any merger of the Alabama corporation with the Georgia corporation for want of legislative authority.

The case presented is not one of merger or of the attempt, never made, of two legislatures to unite in granting a single franchise. The case here is of two franchises granted to the same individuals, one by Alabama and one by Georgia, and the indiscriminate exercise by the individuals of the powers conferred. In support of this the plaintiff in its bill alleged that if there was a double incorporation there was identity of directors, officers and stockholders, the occupation of property operated as one business from an office at West Point, and that the property so employed was all the property of either corporation. (Bill, par. I, Record, p. 473).

The answer filed contains no denial of any one of these facts, nor has either counsel for the appellees ventured to make such a denial, although each has alleged a number of matters, not appearing in the record, as to the organization of the corporation calculated to give the impression though in no way showing that there was not such identity.

In addition to the facts alleged in the bill and now to be taken as true, it appears that the whole litigation arose out of a mortgage executed by the Alabama and Georgia Manufacturing Company not described as a corporation of either state, and that each of the alleged distinct and independent corporations has claimed or admitted, on the appellees' own showing, that it was the mortgagor, in each of which allegations the Huguley Manufacturing Company has joined. The Alabama and Georgia Manufacturing Company, co-defendant with the Huguley Manufacturing Company in the foreclosure suit, admitted the execution by it of a mortgage (Record, p. 14), and later abandoned the suggestion that it was not the same mortgage referred to in the bill; and the Alabama and Georgia Manufacturing Company, co-plaintiff with the Huguley Manufacturing Company in the Alabama suit, alleged in the bill in that suit that it executed this mortgage. (Par. Second, Record, p. 487.) Yet the mortgage appears to be the single act of a single corporation. The whole defence by the Huguley Manufacturing Company has shown, as far as all practical matters are concerned, a single corporation. It is not surprising that Judge Pardee found difficulty in reconciling the position of the present appellees with the previous course of the litigation, throughout which the same individuals have constantly appeared as the persons really interested.

It is indeed painfully apparent that the conception of dual corporations, each independent of the other, was an afterthought. Until the foreclosure suit was finished, except for an obviously hopeless claim to an appeal to this court, no question was raised but that the corporations really interested in the litigation and its result were before the court. The thought of upsetting that result by relying upon there being

two charters came to the appellees' advisers too late to permit of a consistent plan of action. The answer filed in the original foreclosure suit with its details as to payment of interest, change of ownership and the like was the answer of a real defendant and not of two corporations, as the appellees would now have it appear, never possessed of more than a nominal interest in the subject matter, and not capable, according to the theory now presented by the appellees, of having done the acts alleged. The long continued battle of the Huguley Manufacturing Company, defendent in the foreclosure suit, was not carried on by a corporation which, as now alleged in the briefs for the appellees, had no substantial interest, all interest having been, they say, in a corporation of like name chartered in Alabama. Again, the appellees would hardly in their pleadings have alleged so explicitly the title to the property of the Huguley Manufacturing Company before the court in the foreclosure suit and the identity of that corporation with the Huguley Manufacturing Company now before the court if the necessity had been foreseen of distinguishing between two forms of the same body.

If in any case then a corporation consisting of a single body of persons concerned in a single enterprise, but acting under charters from two states, can be bound in both capacities by a judgment or decree against it in one of those capacities, that must be the result in the present case, for there can never be a greater identity or a more indissoluble union than is shown here.

VII.

There was no error in granting an injunction against the further prosecution of any part of the Alabama suit.

Of course if the Alabama and Georgia Manufacturing Company, plaintiff in the Alabama suit, is bound by the proceedings in the foreclosure suit, as we have contended, there can be no doubt of the propriety of the injunction. But if the

Alabama and Georgia Manufacturing Company is not so bound, there was no error.

It appears on the face of the bill in the Alabama suit that the Huguley Manufacturing Company was the owner of the equity of redemption. (Record, p. 492). The only claim made in that bill to an account of rents and profits is by virtue of the alleged ownership of the equity of redemption. It is wholly immaterial in the present stage of the case whether the allegation of ownership by the Huguley Manufacturing Company was in accordance with fact or not. The propriety of the decree of the Circuit Court now under review depends upon the case before it and not upon what counsel for the appellees may state to be the actual facts. The Circuit Court enjoined the further prosecution of a suit based upon a claim for rents and profits which on the allegations of the plaintiffs in that suit was vested only in the Huguley Manufacturing Company. If then this claim of the Huguley Manufacturing Company was barred by the proceedings in the foreclosure suit, the injunction was properly granted, even if the co-plaintiff was not bound by those proceedings. It is perhaps no injustice to conjecture that the Alabama and Georgia Manufacturing Company was joined in that suit because it was believed such joinder might give color to an attempt to relitigate the questions already raised in the foreclosure suit, and the alleged dual existence of the Huguley Manufacturing Company had not then been discovered.

VIII.

The present bill is ancillary to the foreclosure suit.

In principle there is no distinction between the present case and *Julian* v. *Central Trust Co.*, 193 U. S. 93. The court in that case had jurisdiction because the proceedings enjoined were a direct attack upon the decree of the court rendered in the foreclosure suit. The fact commented on by counsel for the appellees, that in that case the Circuit Court in decreeing foreclosure undertook to reserve to itself the

adjudication of claims and liens upon the property, certainly could not determine whether the suit was ancillary or not. A court can not by the form of its decree thus extend its jurisdiction. If the relation of the one suit to the other was such as to make the second ancillary to the first jurisdiction existed; if not, there was no jurisdiction, however much the court might undertake to reserve. In point of fact the matters before the court in *Julian* v. *Central Trust Co.* had nothing to do with the matters the future decision of which the Circuit Court had by its foreclosure decree declared to be reserved. The claim which it was sought to enjoin was one that arose long after the foreclosure was completed and was based solely on the alleged invalidity of the decree confirming title in the purchaser. Jurisdiction was founded on the fact that the intervention of the court was required to protect the purchaser at the sale and secure to it the fruits of the litigation. The same grounds exist here, but with much greater force, because here the attack was made by two corporations, both of which it is submitted were parties to and bound by the decree attacked, and one of which was indisputably the principal and only real defendant in the litigation in which the decree was entered.

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APRIL, 1905.